HCCT 14/2014

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 14 OF 2014

IN THE MATTER of Enforcement of Arbitration Award

and

IN THE MATTER of Section 92 of the Arbitration Ordinance, Cap 609

and

IN THE MATTER of Order 73, rule 10(1) of the Rules of the High Court, Cap 4A

BETWEEN

HONG KONG GOLDEN SOURCE LIMITED (香港金源有限公司)	Applicant
and	
NEW ELEGANT INVESTMENT LIMITED (漢新投資有限公司)	1st Respondent
WIDE UNITED INC (廣聯有限公司)	2nd Respondent

Before: Hon Chow J in Chambers (Not Open to the Public)

Date of Hearing: 28 August 2014

Date of Handing Down Judgment: 15 September 2014

J U D G M E N T

The Applications

1. I have before me two summonses:

(1) a summons taken out by the 2nd respondent, Wide United Inc ("Wide United"), dated 22 May 2014 ("the Setting Aside Summons") seeking to set aside the order herein of Mimmie Chan J dated 31 March 2014 ("the Enforcement Order") granting leave to the applicant to enforce an award made by the China International Economic and Trade Arbitration Commission, South China Sub-Commission, No 92 of 2009, dated 29 June 2009 ("the Award") or, in the alternative, a stay of the Enforcement Order pending the determination of HCA 878 of 2014 ("the High Court Action") or until further order; and

(2) a summons taken out by Guo Hong Qi ("Guo") dated 28 August 2014 ("the Joinder Summons") seeking an order that he may be joined as the 3rd respondent to these proceedings for the purpose of supporting the 2nd respondent's aforesaid application.

The Enforcement Order

2. The applicant, Hong Kong Golden Source Limited ("HKGSL"), and the 1st respondent, New Elegant Investment Limited ("New Elegant"), are companies incorporated in Hong Kong, while Wide United is a company incorporated in Samoa.

3. Guo is a PRC businessman and investor.

4. The subject matter of the dispute between the parties to these proceedings is a 95% shareholding (2,850,000 shares, "the Shares") in a Hong Kong company, Sealight Trading Company Limited ("Sealight"). The Shares are currently registered in the names of New Elegant (90% or 2,700,000 shares) and Wide United (5% or 150,000 shares). Their estimated value is between RMB20 million to 40 million.

5. Sealight has a total issued share capital of HK$3,000,000 divided into 3,000,000 shares of HK$1 each. Apart from the Shares, the remaining 150,000 issued shares in Sealight are currently registered in the name of HKGSL.

6. In or about 2005, the Shares were transferred by HKGSL to New Elegant and Wide United, being nominees of China Guanfa Bank ("CGB"), pursuant to three written agreements all dated 2 February 2005 between HKGSL and (i) CGB, (ii) New Elegant, and (iii) Wide United respectively ("the Three Agreements").

7. Subsequently, HKGSL alleged that CGB breached its agreement with HKGSL, and the dispute between them was referred to arbitration in July 2008. In the arbitration, HKGSL was the claimant, and CGB, New Elegant and Wide United were the 1st, 2nd and 3rd respondents respectively. By the Award, it was adjudged that the Three Agreements be discharged, and New Elegant and Wide United were ordered to transfer the Shares back to HKGSL.

8. Apparently, New Elegant and Wide United have failed or refused to comply with the Award and thus the Shares are currently still held or registered in their names.

9. By an *ex parte* application dated 7 March 2014, HKGSL sought the leave of the court, pursuant to section 84(1) and (2) of the Arbitration Ordinance, Cap 609 ("the New Arbitration Ordinance"), and Order 73, rule 10(1) of the Rules of the High Court, Cap 4A ("the RHC"), to enforce the Award against New Elegant and Wide United.

10. By a further *ex parte* application filed on 19 March 2014, HKGSL sought an interlocutory injunction from the court to restrain Wide United from dealing with the 150,000 Shares in Sealight registered in its name. This application was supported by the 2nd Affirmation of Li Hui Zhen, a director of HKGSL, also filed on 19 March 2014. For the present purposes, it is not necessary for me to set out HKGSL's grounds of its application for the interlocutory injunction against Wide United, save to note that in the said affirmation, Li Hui Zhen on behalf of HKGSL asserted that HKGSL beneficially owned 100% of Sealight.

11. On 25 March 2014, HKGSL took out an *inter partes* application for the same interlocutory injunction against Wide United.

12. On 28 March 2014, Ng J granted an interlocutory injunction against Wide United restraining it from dealing with the 150,000 shares in Sealight pending further order of the court.

13. On 31 March 2014, Mimmie Chan J granted the Enforcement Order, whereby HKGSL was given leave, pursuant to section 92 of the New Arbitration Ordinance and Order 73, rule 10(1) of the Rules of the High Court, to enforce the Award in the same manner as a judgment or order of this court to the following effect:

> (1) New Elegant do transfer back to HKGSL 90% of the shareholding of Sealight;
>
> (2) Wide United do transfer back to HKGSL 5% of the shareholding of Sealight; and
>
> (3) New Elegant and Wide United do all such acts and execute all such documents as may be necessary to transfer the said shareholdings to HKGSL.

14. The Enforcement Order also provided that New Elegant and Wide United could apply to set aside the order within 14 days of the service of the order on them.

15. On 17 April 2014, Wide Union applied for an extension of time to apply to set aside the Enforcement Order.

HKGSL's application to compel performance of Enforcement Order

16. By a summons dated 2 May 2014, HKGSL applied for a mandatory order to compel New Elegant and Wide United to forthwith execute all necessary documents, including bought and sold notes and instruments of transfer, for the transfer of the Shares to HKGSL or its nominee, and that in default thereof the Registrar of the High Court be directed to execute the transfer documents on behalf of New Elegant and Wide United.

The order of L Chan J dated 16 May 2014

17. Wide United's summons of 17 April 2014 for an extension of time to apply to set aside the Enforcement Order and HKGSL's summons of 2 May 2014 for a mandatory order to compel performance of the Enforcement Order came before L Chan J, who ordered on 16 May 2014 (*inter alia*) that:

> (1) the time for Wide United to apply to set aside the Enforcement Order be extended to 23 May 2014; and
>
> (2) HKGSL's said application be heard immediately after Wide United's summons to set aside the Enforcement Order.

Guo claims to be beneficially entitled to the Shares

18. It is Guo's case that:

> (1) he was at all material times the beneficial owner of the Shares which were held by HKGSL as his nominee;
>
> (2) HKGSL entered into the Three Agreements with CGB, New Elegant and Wide United respectively upon Guo's instruction;

(3) now that the Three Agreements have been discharged, he remains the beneficial of the Shares ordered to be transferred back to HKGSL;

(4) HKGSL commenced the arbitration proceedings and the current proceedings seeking the return of the Shares without any knowledge or consent of Guo; and

(5) HKGSL has taken these steps for the purpose of and in the course of dishonestly depriving Guo of the Shares.

19. It is not in dispute that HKGSL commenced the arbitration proceedings, and subsequently the proceedings herein, without the knowledge or consent of Guo.

20. According to Guo, due to a monetary dispute in China, he was restrained from leaving his place of residence in China between March 2004 and March 2009, and his freedom to travel out of China had also been restricted until 15 April 2014 when he was allowed to travel to Hong Kong. Guo was appointed a director of Wide United on 15 April 2014, having acquired ownership and control of the same. Guo says that he came to learn of the arbitration proceedings and these proceedings on or about 16 April 2014 after consulting his lawyers in Hong Kong and, through his lawyers, wrote to HKGSL's solicitors and HKGSL on 22 April 2014 and 23 April 2014 respectively asserting his claim of beneficial ownership of the Shares.

21. Guo's claim that he is beneficially entitled to the Shares is disputed by HKGSL.

22. For the present purposes, it is not necessary for me to set out the evidence relied upon by Wide United and Guo in support of Guo's case, or the evidence relied upon by HKGSL to counter that case. This is because Mr William Wong SC (acting for HKGSL) accepts that, on the evidence, Guo has demonstrated a "real prospect of success" in proving his beneficial ownership of the Shares, while Ms Lisa K Y Wong SC (acting for Wide United and Guo) does not suggest that this court can determine the question of beneficial ownership on affidavit evidence alone.

The High Court Action

23. On 20 May 2014, Guo commenced the High Court Action against HKGSL seeking a declaration that he is the true beneficial owner of (*inter alia*) all the 3,000,000 issued shares in Sealight, consisting of :

(i) 2,700,000 shares registered in the name of New Elegant;

(ii) 150,000 shares registered in the name of Wide United; and

(iii) 150,000 shares registered in the name of HKGSL, and

an order for the delivery up of those shares to Guo or his nominee.

24. Also on 20 May 2014, Guo took out a summons in the High Court Action seeking an interlocutory injunction against HKGSL to restrain it from dealing with (*inter alia*) the 150,000 shares in Sealight registered in its name pending the trial of the action or further order of the court. A consent summons to give effect to the interlocutory injunction sought by Guo was filed by the parties to the High Action on 28 May 2014.

The Setting Aside Summons

25. Meanwhile, pursuant to the aforesaid order of L Chan J, Wide United filed the Setting Aside Summons on 23 May 2014.

Applicable principles

26. At the outset, it may be noted that it is common ground between the parties that since the Award was made on 29 June 2009, the regime governing the enforcement of the Award in Hong Kong should be the Arbitration Ordinance, Cap 341 ("the Old Arbitration Ordinance"), by virtue of paragraph 1 of Schedule 3 to the New Arbitration Ordinance, and accordingly the Enforcement Order should not, technically, have been made pursuant to section 92 of the New Arbitration Ordinance.

27. Nevertheless, Ms Wong accepts that :

(i) the court had in fact jurisdiction to make the Enforcement Order, albeit that it ought to have been made pursuant to the corresponding provisions in the Old Arbitration Ordinance (namely, sections 2GG and 40B thereof); and

(ii) the principles governing the refusal of enforcement of a Mainland award based on the ground of "public policy" are materially the same under section 40E(3) of the Old Arbitration Ordinance and section 95(3)(b) of the New Arbitration Ordinance.

Further, Ms Wong has on behalf of Wide United and Guo given an undertaking to the court that they would not challenge the Enforcement Order on the basis that it refers to the New Arbitration Ordinance. The parties' arguments are premised on the assumption that the Enforcement Order was made pursuant to sections 2GG and 40B of the Old Arbitration Ordinance and the application to set aside the Enforcement Ordinance was made pursuant to section 40E(3) of the Old Arbitration Ordinance, and I shall proceed on this basis.

28. The parties are also agreed on the applicable principles on which the court may refuse to enforce a Mainland award on the ground that its enforcement would be contrary to public policy under section 40E(3) of the Old Arbitration Ordinance. My attention has been drawn to, amongst others, *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111; *Granton Natural Resources Co Ltd v Armco Metals International Ltd*, HCCT 5/2012 (7 December 2012); *A v R (Arbitration: Enforcement)* [2009] HKLRD 389; and *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2009) 12 HKCFAR 84, from which the following principles can be derived:

(1) The primary supervisory function in respect of arbitration rests with the court of supervisory jurisdiction, ie the Mainland courts in respect of Mainland awards, as distinct from the enforcement court, ie the Hong Kong courts.

(2) The prohibition against refusal of enforcement of a Mainland award save as specifically provided for in section 40E of the Old Arbitration Ordinance gives effect to the principles of finality and comity.

(3) The legislative intent is that a Mainland award should be readily enforceable in Hong Kong and refusal to enforce is an exception rather than the rule.

(4) The discretion which the court has to refuse enforcement is a residuary one, and the threshold to be crossed by a party seeking to resist enforcement against him is a very high one.

(5) Where enforcement is resisted on the ground that "it would be contrary to public policy to enforce the award" under section 40E(3) of the Old Arbitration Ordinance, the relevant public policy is that of the country in which the enforcement is sought and not that of the country in which the award was made.

(6) Public policy itself leans towards the enforcement of foreign (including Mainland) arbitral awards.

(7) The expression "contrary to public policy" is to be given a narrow construction, namely, contrary to the fundamental conceptions of morality and justice of the forum in which enforcement is being sought, or contrary to the most basic notions of morality and justice. Put in another way, if "public policy" is to be relied upon to resist the enforcement of a Mainland award, it must be shown that there is a substantial injustice arising out of an award which is so shocking to the court's conscience as to render enforcement repugnant.

(8) Even though a case comes with a category in section 40E(3) of the Old Arbitration Ordinance where enforcement of an award may be refused, the court has a discretion nevertheless to permit enforcement.

Discussion

29. The relevant public policy grounds relied upon by Wide United and Guo, as put by Ms Wong, are "the prevention of criminal, fraudulent, corrupt, oppressive or otherwise immoral, unconscionable or other reprehensible behaviour" and "the proper administration of justice".

30. The present case, according to Ms Wong, is one where the arbitration was pursued, and the Award was obtained and is being enforced by HKGSL, as a scheme calculated to deprive Guo of his assets in breach of trust, and accordingly the court should not be lending its helping hands to complete such scheme by enforcing the Award.

31. Ms Wong submits that while cases failing within these categories tend to be concerned with the conduct of the arbitration by the tribunal or the enforcing party's conduct in the arbitration leading to the award sought to be enforced, the public interests in preventing any unconscionable or reprehensible behaviour or affront to the administration of justice should not be confined to such cases but should be broad enough to encompass the more fundamental injustice where the arbitral proceedings were undertaken in the first place and the award obtained and sought to be enforced in breach of trust duties owed by the enforcing party in respect of the subject property of the arbitration and with a view to misappropriating such trust property, upon the complaint of the true beneficial owner.

32. In this regard, I have been referred by Ms Wong to authorities which say that considerations of public policy can never be exhaustively defined (see *Deutsche Schachtbau und Tiefbohr-Gesellschaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295 at 316, *per* Sir John Donaldson MR; *Profilati Italia SRL v Painewebber Inc* [2001] CLC 672 at paragraph 17, *per* Moore-Bick J).

33. As a matter of principle, it seems to me plainly correct that the categories of cases which may lead the court to refuse to enforce a foreign arbitral award based on considerations of public policy are not closed. However, it is also important to bear in mind the caution expressed by Moore-Bick J in the same paragraph in his judgment in *Profilati Italia SRL v Painewebber Inc*, *viz*:

> "It would be unwise in my view to attempt to define the circumstances in which an award might be set aside or remitted on public policy grounds, but … I think that where the successful party is said to have procured the award in a way which is contrary to public policy it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on his part has contributed in a substantial way to obtaining an award in his favour. Moreover, I do not think that the court should be quick to interfere under this section. In those cases in which s.68 has so far been considered the court has emphasised that it is intended to operate only in extreme cases."

34. In support of Wide United and Guo's applications, Ms Wong relies heavily on the judgment of Kaplan J in *J J Argo Industries (P) Ltd (a firm) v Texuna International Ltd* [1994] 1 HKLR 89. In that case, the defendant applied to set aside the leave granted by the court to the plaintiff to enforce an arbitration award made by a GAFTA Tribunal in London contending that the award was procured by fraud in that one of the defendant's witnesses was kidnapped and forced to swear an affidavit contradicting what he had previously said in a letter. The defendant argued, relying on the New York Convention and section 44 of the Old Arbitration Ordinance, that the court should refuse to enforce the award on the ground that it would be contrary to public policy to enforce it. At page 92 of the report, the learned judge stated as follows:

> "I am quite satisfied that if the facts alleged are made out they are capable of coming within the ambit of public policy. In other words it would be contrary to the public policy of Hong Kong to enforce an award which had been obtained in the circumstances alleged. I quite agree with Mr. Stevenson that public policy has been given a narrow meaning by various courts considering the New York Convention … However narrow the interpretation I fail to see how it can be denied that to enforce an award obtained in the circumstances alleged would be in breach of the public policy of Hong Kong. For instance, if an arbitrator had been corrupt it would be in breach of public policy to enforce his award. I recognise that there is a discretion in s.44 but the time has not yet arrived for me to consider the exercise of that discretion. I must hear the evidence first and reach conclusions on the disputed facts."

35. At page 93 of the report, the learned judge further stated the following:

> "All that I have to decide at this stage is whether sufficient evidence has been placed before me, which if believed, could establish this allegation … After very careful consideration I do not feel able to conclude that there is no such evidence before me. In all the circumstances, it would not be right for me to say anymore about the evidence as I will have to listen to the viva voce evidence on this topic and reach a concluded view at a later stage … In arriving at the conclusion that the evidence is sufficient to meet the necessary threshold I have taken the test suggested by Mr. Stevenson namely whether this evidence would persuade me to set aside a regular judgment. In other words, I applied the Saudi Eagle test ([1986] 2 Lloyd's Rep 221)."

36. In the end, the learned judge adjourned the defendant's application so that viva voce evidence on the allegation of kidnapping could be heard, and the issue could be determined after hearing such evidence.

37. In *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, one of the grounds relied upon by the defendant to resist the enforcement of a Convention award was that it was obtained by fraud and thus the enforcement of the award would be contrary to public policy. Ribeiro PJ, giving the leading judgment of the Court of Final Appeal, agreed with the Court of Appeal that the appropriate threshold to be crossed by the defendant to justify the fraud allegation being remitted to the judge at first instance for trial was "a real prospect of success" that the award had been obtained by fraud (see paragraph 50 of the judgment of the Court of Final Appeal).

38. As earlier mentioned, I proceed on the basis that Guo has a real prospect of success in proving his beneficial ownership of the Shares. In view of the undisputed fact that HKGSL commenced the arbitration proceedings, and subsequently the proceedings herein, without the knowledge or consent of Guo, and the assertion made by a director (Li Hui Zhen) of HKGSL on its behalf that Sealight is 100% beneficially owned by HKGSL, if Guo is indeed the true beneficial owner of the Shares, it can reasonably be inferred that HKGSL has been pursuing a scheme to deprive Guo of his assets.

39. I am not, however, satisfied that the matters mentioned in paragraph 38 above (assuming that they can be proved at the end of the day) are sufficient to lead the court to conclude that "it would be contrary to public policy to enforce the award" for the purpose of section 40E(3) of the Old Arbitration Ordinance, for two main reasons. First, the allegations do not impinge upon the arbitral process, or the substance or correctness of the arbitral award. They relate to matters wholly extraneous to the arbitral process and arbitral award. Second, the enforcement of the Award merely means that New Elegant and Wide United, who on any view of the matters are not entitled to keep the Shares, have to return them to HKGSL, being the party from whom New Elegant and Wide United received the Shares in the first place. Irrespective of whether or not Guo is the ultimate beneficial owner of the Shares, it seems to me correct in principle that New Elegant and Wide United should return the Shares to HKGSL following the discharge of the Three Agreements.

40. In any event, even if Wide United and Guo's allegations are sufficient to make out a case that it would be contrary to public policy to enforce the Award for the purpose of section 40E(3) of the Old Arbitration Ordinance, I would still decline to exercise my discretion to refuse to enforce the Award on the facts of the present case. This is because, in my view, the most natural and appropriate forum to resolve the issue of beneficial ownership of the Shares is the High Court Action already commenced by Guo against HKGSL claiming for delivery up of (*inter alia*) the Shares to Guo or his nominees.

41. Further, it is perfectly open to Guo to seek, in the High Court Action, an interim injunction or other appropriate interim relief to safeguard or preserve the Shares pending the trial of that action, as Guo has done in relation to the other subject matters of that action. Whether Guo is entitled to such interim injunction or relief is of course not a matter for me to decide in the present proceedings, but it is clear that Guo is not left without any remedy even if the present applications are rejected.

42. Having regard to the well established public policy that the court should lean towards the enforcement of foreign (including Mainland) arbitral awards and in view of the foregoing considerations, I would not be prepared to exercise my discretion to refuse to enforce the Award under section 40E(3) of the Old Arbitration Ordinance even if I were otherwise minded to accept that Wide United and Guo's allegations are sufficient to make out a case that it would be contrary to public policy to enforce the Award.

Disposition

43. For the above reasons, I dismiss the Setting Aside Summons.

44. Having reached this position, I also dismiss Guo's Joinder Summons.

45. For the sake of completeness, I should mention that I do not consider the mere fact that Guo was not a party to the arbitration necessarily debars him from seeking to invoke the court's discretion to refuse to enforce the Award under section 40E(3) of the Old Arbitration Ordinance. The question whether, in any given case, a non-party to the arbitral proceedings can apply to the court under section 40E of the Old Arbitration Ordinance (or the corresponding provisions in the New Arbitration Ordinance) to refuse to enforce a Mainland award must depend on the facts and circumstances of that case. In the present case I doubt whether it is necessary for Guo to be joined as a party to these proceedings in view of the fact that Guo, being apparently now in control of Wide United, plainly can procure (and did procure) Wide United to make an application to set aside the Enforcement Order. This is, however, an academic question in light of the earlier conclusions that I have reached in the present case.

46. In relation to costs, the parties are agreed that in an unsuccessful application to set aside or resist enforcement of an arbitral award, costs of the party seeking to enforce the arbitral award are normally ordered to be taxed on an indemnity basis (see *Guo Shun Kai v Wing Shing Chemical Co Ltd*, HCCT 35/2012 (22 January 2014), paragraph 59, *per* G Lam J). I therefore make an order *nisi* that the HKGSL shall have the costs of the Setting Aside Summons and the Joinder Summons, to be taxed on an indemnity basis if not agreed, with certificate for two counsel.

47. Lastly, it remains for me to thank counsel for their helpful submissions to the court.

(Anderson Chow)
Judge of the Court of First Instance
High Court

Mr William Wong SC, Mr Lawrence Cheung & Mr Michael Lok, instructed by LCP, for the applicant

The 1st respondent, absent

Ms Lisa K Y Wong SC & Ms Janine Cheung, instructed by S K Lam, Alfred Chan & Co, for the 2nd respondent